No. 83-272

In The

# Supreme Court of the United States

October Term, 1983

BASIC CONSTRUCTION COMPANY,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## REPLY BRIEF ON BEHALF OF PETITIONER BASIC CONSTRUCTION COMPANY

LEWIS T. BOOKER
L. NEAL ELLIS, JR.
HUNTON & WILLIAMS
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

*Attorneys for Petitioner*

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### I.

### INTRODUCTION

This case raises important questions of first impression in this Court concerning the antitrust criminal responsibility of a corporation for the unauthorized acts of its minor employees. Basic Construction Company filed its petition for a writ of certiorari on August 19, 1983. After obtaining an extension of time, the Government filed its brief in opposition on October 3, 1983. Because the Government's brief both mischaracterizes the evidence of record and misstates the applicable governing law, this brief is submitted in reply.

## II.

## ARGUMENT

The Government's brief suggests that there is no authority for the proposition that a corporation's diligent enforcement of an antitrust compliance policy provides a defense to a Sherman Act Section 1 prosecution. Citing an article from the Harvard Law Review,* the Government contends that the due diligence defense recognized by the Model Penal Code does not apply in the price fixing context because "[p]rice fixing is precisely the type of offense 'for which the legislature has plainly intended to impose liability on corporations.' "** The quotation lifted by the Government from the Review stops just short of the passage which expressly recognizes that the diligent enforcement of antitrust compliance policy may provide a defense to Section 1 prosecution:

> But the draftsmen of the Model Penal Code, believing that the primary purpose of holding corporations accountable for the acts of lower-level employees is to encourage diligent supervision by managerial officials, added an affirmative defense: the corporation can escape liability under the second system by proving by a preponderance of the evidence that the high managerial agent with supervisory responsibility over the subject matter of the offense acted with "due diligence" to prevent it.***

The Government offered no support for its contention that alleged bidrigging violations fall within any exception to Section 2.07(5) of the Model Penal Code.

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* *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1251-52 (1979) [*Developments in the Law*].

** Government Brief at 7.

*** *Developments in the Law*, 92 Harv. L. Rev. at 1252.

The Government's characterization of the "settled law" is even more suspect. According to the Government, a corporation may be held absolutely liable for the criminal acts of its employees "even though the unlawful conduct was not specifically authorized, or was even contrary to the agent's actual instructions."* To be sure, at least two courts of appeals have approved the due diligence defense and recognized that the corporation's issuance of explicit instructions and concomitant enforcement of an antitrust compliance policy provides a defense to a Section 1 prosecution. In *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1972), the Ninth Circuit concluded that although "general" instructions without more provide no defense to a Section 1 charge, a corporation might gain exculpation if the general instructions are enforced by "means commensurate with the obvious risks." Similarly, in *United States* v. *Koppers Co. Inc.*, Crim. No. 79-85 (D.Conn., June 26, 1980), the district court charged the jury that:

> One of the factors, among others, that you may consider in determining the intent imputed to Koppers Company through its [managerial] agents or employees is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary imputed intent. If, however, you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining

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* Government Brief at 5.

> whether or not to impute an agent or employee's intent to the Koppers Company.*

The court's instruction was expressly approved on appeal by the Second Circuit. *United States* v. *Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981) ("on all issues relevant to this case the [Model Penal] Code's suggested standard of imputed liability in antitrust cases is precisely the one followed by the district court").

In the instant case, both Basic employees, Howell and Colosi, were warned specifically not to collude with competitors on the bidding of asphalt paving contracts. *See* J.A. 171, 219, 221, 224, 253, 292-93, 318-21, 324. Unlike the corporate defendant in *Hilton Hotels*, Basic undertook the most severe measures available to it to enforce its policy. There was no evidence that the colluding purchasing agent in *Hilton Hotels* received any discipline; Basic fired its errant employees, Howell immediately and Colosi as soon as Basic could satisfy itself that he had ignored the explicit warnings given him after Howell's discharge. Both were terminated well more than a year before any indictment was returned against Basic. The facts therefore present an appropriate case, even within the meaning of the Government's cases, for submission to the jury on the issue of the corporation's policy of anti-collusion. *See also United States* v. *Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment . . . It is a question of fact whether measures taken

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* *United States* v. *Koppers Co. Inc.*, Crim. No. 79-85 (D.Conn., June 26, 1980) *reprinted in* Lipson, *A Survey on the Ins and Outs of Antitrust Compliance*, 51 Antitrust L.J. 517, 524 n.15 (1983).

to enforce corporate policy in this area will adequately insulate the corporation against such acts . . .").

In an effort to paint Basic's policy as a whitewash, the Government argues that the "compliance policy post dated the violations at issue." They contend that "[w]hile [Basic's] bidrigging activities reached back to the early 1970's, [Basic] did not fire Howell for bidrigging until 1979, a year after the offense here, when the Government had already begun its grand jury investigation of area highway contractors for bidrigging."* The Government has, unintentionally we are sure, completely misstated the trial evidence to create a totally erroneous impression of the facts. As the Government would have this Court see it, Basic kept Howell on the payroll for a year after Basic knew of his bidrigging and fired him only when the "government had already begun its grand jury investigation of area highway contractors for bidrigging."

The unrefuted evidence at trial indicated that Basic's management had no knowledge of Colosi's or Howell's bidrigging activities until 1979 when George Lemon exposed Howell's collusion on the Butler Farms Road project to William Shaw. J.A. 224, 280, 296; Tr. 463. Howell was terminated immediately upon his being confronted with the facts. Not only did Howell and Colosi fail to disclose the bidrigging to management, they attempted to conceal it. J.A. 280, 296; Tr. 440-41, 463. Contrary to the Government's representation, indictment of highway contractors did not take place until at the earliest February, 1980, almost a year after Howell was terminated. *See United States* v. *Ashland-Warren, Inc., et al.*, Criminal No. 80-0022-R (E.D. Va., Feb., 1980). Thus, the inference which the Govern-

* Government Brief at 8 n.9. The indictment charged allocation of highway resurfacing contracts let in 1978.

ment has attempted to create is both misleading and unsupported by the record.

The proof for Basic demonstrated overwhelmingly that the company's policy was not a whitewash or a frill. As early as 1975, Highway Department employees and Howell and Colosi in particular were repeatedly admonished not to collude with competitors on highway paving work. J.A. 171, 221, 292-93, 318-21, 324. In group meetings of Basic's Highway Department beginning in late 1977, Basic's vice president warned employees, including Howell and Colosi, that they should be careful not to violate the antitrust laws. J.A. 292, 319. They were well aware that violation of the policy would lead to dismissal. J.A. 252, 309, 323. It was, of course, up to the jury to determine whether Basic's policy was real or a sham. But the trial judge's instructions precluded the jury's consideration of the evidence on the issue of the corporation's intent to violate the antitrust laws.

## III.

## CONCLUSION

Although there was substantial evidence in this case that Basic had diligently disseminated and enforced a policy of compliance with the antitrust laws, the district court refused to instruct the jury either that proof of due diligence provided a defense to the Section 1 charge or that such evidence could be considered on the issue of the corporation's intent to violate the antitrust laws. Instead, the court limited the jury's consideration of the policy to the issue of whether the errant employees had acted to benefit the corporation and instructed the jury that unauthorized conduct, even if contrary to the employee's actual instructions, could be imputed to the corporation.

The instruction given on the scope of a corporation's criminal liability for acts of its employees went to the very essence of Basic's defense at trial. The United States points out that Basic did not deny the criminal conduct of its employees, Howell and Colosi. That much is true. But the issue squarely presented for this Court's review is whether under the circumstances of this case a corporation should be held strictly liable for the criminal acts of employees even though the employees deliberately violated the company's policies and instructions. Although this Court's decision in *United States* v. *United States Gypsum Company*, 438 U.S. 422 (1978), established that intent is an essential element of a Section 1 offense, the instruction prevented the jury from considering testimony by Basic's management and employees that Basic had promulgated, disseminated and enforced a policy against collusion with competitors on bidding.

Because at least two courts of appeals have held that such evidence may provide a defense to a Sherman Act Section 1 charge, this Court has an opportunity to clarify the scope of a corporation's antitrust criminal responsibility for the unauthorized acts of its minor employees.

Respectfully submitted,
BASIC CONSTRUCTION COMPANY
By Lewis T Booker .....
LEWIS T. BOOKER

LEWIS T. BOOKER
L. NEAL ELLIS, JR.
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
*Of Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court I this day served three (3) copies of the foregoing reply brief on behalf of petitioner Basic Construction Company upon each counsel for all of the parties required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

(1) William J. Murphy, Vincent J. Fuller, Barry S. Simon, Linda C. Ray, Williams & Connolly, 839-17th Street, N.W., Washington, D.C. 20006; and William F. Miller, Rideout & Miller, 210 Parkway Drive, P. O. Box CK, Williamsburg, Virginia 23185 (counsel to Henry S. Branscome and Henry S. Branscome, Inc.);

(2) Margaret G. Halpern, Department of Justice, William F. Baxter, Assistant Attorney General, John J. Powers, III, Department of Justice, Theresa H. Clinton, Diane R. Kilbourne, Antitrust Division—Room 3313, Department of Justice, Washington, D.C. 20530 (counsel to the United States); and

(3) Solicitor General, Department of Justice, Washington, D.C. 20530.

By Lewis T Booker .....
LEWIS T. BOOKER

Dated: October 26, 1983